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No. 91-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIACOM INTERNATIONAL, INC.,

Petitioner,

vs.

CARL C. ICAHN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

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INTRODUCTION

In their Brief in Opposition ("Resp. Br."), respondents raise various factual arguments regarding the value of Viacom's shares in May 1986 and thereafter. Consideration of the full record submitted to both the District Court and the Second Circuit reveals disputed issues of material fact, a point recognized by both the District Court [A-1084-1088][1] and by Judge Mahoney in his concurring opinion. *Viacom International, Inc. v. Icahn*,

[1] Page references preceded by A-____ refer to the four volume Joint Appendix filed in the Court of Appeals.

946 F.2d 998, 1002 (2d Cir. 1991). Respondents' factual arguments are contradicted by this hotly-contested record. More significantly, they underscore the importance of the issue presented in the petition. Summary rejection of a theory of damages central to securities litigation, upon a hotly-contested factual record, is worthy of this Court's attention.

ARGUMENT

THE MARKET EFFICIENTLY VALUED VIACOM STOCK AT A PRICE SUBSTANTIALLY BELOW THE GREENMAIL PREMIUM PAID TO ICAHN

Neither the Second Circuit nor respondents addressed the legal issue of whether Viacom suffered injury to its business or property. Rather, the Second Circuit accepted Icahn's factual contention that he obtained no premium (and, therefore, that Viacom was not damaged) because Viacom shares were worth more than the consideration Icahn received on May 22, 1986.

Yet, Viacom submitted evidence below in support of the proposition that the most reliable measure of the then present value of Viacom's shares was the market price, a proposition fully consistent with the efficient capital market hypothesis and the fraud on the market theory. Further, Viacom submitted evidence that, contrary to the arguments raised here by respondents, the market was fully apprised of the information Icahn claims was "not communicated to the market." Resp. Br. at 13.

The issues of material fact in dispute with regard to these matters were summarized in the record below through the deposition testimony of plaintiff's expert Hugh R. Lamle (A-810-18) and through the affidavit of plaintiff's expert Daniel R. Fischel (A-1011-24).

On May 21 — the day before the Icahn buy-back transaction was commenced — the closing price of Viacom's common stock was $61.125 per share. Based on the assumption that Icahn and his group received approximately $79.50 per share for their holdings, they realized over $60 million more than if they had sold their 3,498,200 shares at the prevailing market price (A-1012-13).

In May 1986, Viacom's common stock was listed on the New York Stock Exchange and was actively traded. Average daily volume during May 1986 was 958,695 shares. The stock was widely followed by analysts and was reported on regularly in the financial press. During this period, at least thirteen analysts published earnings estimates for the company and articles on Viacom appeared in publications such as *The Wall Street Journal*, *The New York Times* and *The Los Angeles Times* (A-1015).

In describing the information not available to the financial community in May 1986, Icahn includes "the fact that Viacom's management would attempt to purchase the company in just four months with an opening bid of $81 per share, and the fact that within the ensuing five months the company would be purchased at a price of $111 per share." Resp. Br. at 13. The difficulty with this assertion is that, as of May 1986, neither of these events had occurred and therefore, by definition, neither could have been disclosed. Nor did Icahn submit any evidence which suggested that these future events were even contemplated in May of 1986.

On the contrary, *the evidence presented to the courts below was unequivocal and uncontradicted: the Viacom Board had no intention of selling Viacom in May of 1986.* Viacom's policies and plans (including the poison pill, which Respondents bemoan) were all adopted with a view to maximizing long-term shareholder value, with Viacom remaining independent (A-823-78).[2] The Second Circuit's determination and respondents' arguments

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[2] Respondents concede that Viacom's "poison pill" had been adopted four months before Icahn's acquisition of Viacom shares became known to Viacom. Resp. Br. at 5. It is, to say the least, disingenuous for Icahn to complain that Viacom's "scorched earth" defense would "dilute Mr. Icahn's stock position by more than 50 percent . . ." (Resp. Br. at 6) and that Viacom's Form S-3, filed on May 14 — the day *before* Icahn's 13-D filing, was intended as a "threat to implement these lethal defensive measures," leaving Icahn with no choice but to "assume control of a debt-ridden company bearing little resemblance to the corporation [Icahn and Viacom's] other shareholders had invested in, or [to] sell [his] shares back to Viacom." (Resp. Br. at 6-7). For example, on May 1, 1986, two weeks prior to Viacom's S-3 filing, Icahn informed Joseph Perella, Viacom's investment banker, that he was interested in Viacom's repurchasing his shares at a premium (A-1007).

both confuse the fundamental distinction between the value of shares trading in the marketplace and the value of an entire company when purchased at a premium in a corporate control transaction at a later time (A-1018).

Information concerning the value of such prospective corporate control transactions was widely available to the investment community. During the period leading up to the repurchase transaction, there were numerous articles and analyst reports discussing valuation estimates and the price that might be paid for Viacom stock in a control transaction which were consistent with the results of the First Boston and Donaldson Lufkin & Jenrette studies commissioned by Viacom's Board (A-1019-20).

Similarly, Lamle testified during his deposition that it was well known that the break-up value of Viacom was likely to be in the $100 range, but cautioned that "one has to distinguish between the value of the company and the value of the stock" (A-813). Furthermore, Lamle believed that the market incorporated in its assessment of the value of Viacom an asset value in the $100 range. In fact, Lamle testified that the market was efficient in valuing Viacom stock and was aware of the facts contained in the First Boston and DLJ reports (A-814-18).

Accordingly, there was ample evidence in the record below to support Viacom's contention that the market price for its common stock on May 22, 1986 fully reflected the possibility that on a restructuring, liquidation or tender offer, the value of Viacom might be worth approximately $100 per share. Respondents submitted no evidence to the contrary.

Icahn's factual assertion about adverse changes in asset values in the cable television industry (Resp. Br. at 10), is also inconsistent with the evidence in the record below. The Donaldson Lufkin & Jenrette valuation report includes a list of cable companies that it considered comparable to Viacom. To test respondents' assertion that the cable television industry fared poorly between May 1986 and March 1987, Fischel examined the stock market performance of these comparable companies.

The stocks of 7 of the 8 comparable firms rose in value over the period in question, with an average increase of 20.6 percent. The market as a whole also rose by 19.0 percent during this period (A-1023).

A *Business Week* article from February 1987 provided further evidence contradicting Icahn's "facts" about the cable television industry during this period. The article, "Where the Deals Still Dazzle," described how prices for cable systems and companies were "soaring" at the time and how the prospect of cable as a significant competitor for the networks "has sent cable company values skyrocketing" (A-1023).

We submit that this conflicting evidence regarding the value of Viacom's shares in May 1986 further underscores the importance of this Court's consideration of the summary disposition of the theory of damages in this case.

CONCLUSION

The record in this case raises significant issues regarding the right of a victim of Hobbs Act extortion to a trial on disputed evidence of injury to its business or property. We respectfully submit that review of this case will permit the Court to clarify the standard by which the courts are to assess the evidence of injury to business or property under RICO.

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Respectfully submitted

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